IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 261.

FRANK M. COBB, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner in the above entitled case herewith presents his Petition for a Rehearing, and states:

That on October 10, 1949, the Petition for a Writ of Certiorari in this case was denied. The entry further stated "Mr. Justice Black and Mr. Justice Jackson are of the opinion certiorari should be granted."

Petitioner, in support of his Petition for Rehearing herein, states the following grounds:

Subsequent to the filing of the Petition for a Writ of Certiorari herein on August 15, 1949, Petitioner learned that on June 3, 1949, the identical question involved in this case, to wit, whether attorney fees paid by a taxpayer in contesting a gift tax deficiency are deductible for income tax purposes, was decided by the District Court for the Southern District of Florida, in *Lykes* v. *United States*, 84 F. Supp. 537. That court held that the attorney fees paid by the taxpayer were deductible. In commenting upon the decision of the Court of Appeals for the Sixth Circuit in the case at bar, that court said:

> " . . . The taxpayer in that case, as does the taxpayer here, relied upon *Bingham et al.* v. *Commissioner of Internal Revenue*, 325 U. S. 365, as supporting his position for the deduction. In the Cobb case the Court of Appeals held that the Bingham case was not controlling and went to considerable pains to point out its reasons for so holding. This court has carefully reviewed these reasons, but finds itself unable to follow them." (Opinion of Court. See Appendix to Reply Brief, in case at bar, p. 10.)

In September, 1949, the Brief for the Respondent in Opposition was filed, and on September 30, 1949, Petitioner herein filed his Reply Brief, including in the Appendix a full copy of the opinion of said District Court in the *Lykes* case.

Rule 38 of the Rules of this Court provides in subparagraph (4) that upon the expiration of the period for filing the Respondent's Brief, etc.:

> "... the petition, record and briefs shall be distributed by the Clerk to the Court for its consideration.
>
> "(a) Timely reply briefs will be considered, but distribution under this rule shall not be delayed pending the filing of such briefs."

Petitioner urges as a ground for rehearing herein that in view of the requirements of said Rule of Court and the short period between the filing of the Reply Brief on September 30, 1949 and the decision of this Court on October 10, 1949, there was not available to this Court time to receive and consider said Reply Brief. It is improbable that Mr. Justice Douglas during this period of time was able to give consideration to this matter. Mr. Justice Minton did not become a member of this Court until October 12, 1949.

The Court of Appeals for the Fifth Circuit has not yet passed on the *Lykes* case, which was decided June 3, 1949. If the District Court is affirmed, then a conflict of decisions *on the precise question* in the Fifth and Sixth Circuits would exist. To defeat this possibility, the Government may not appeal or may dismiss its appeal. The Government may decide to pay the sum of $5,665.78 with interest, being the judgment of the District Court in the *Lykes* case, and enforce the Treasury Regulation (111, Sec. 29.23-(a)-15(b), as amended by TD 5513) for an *indefinite* period. The monetary advantage to the United States Treasury in pursuing this course of action is obvious.

We submit that grounds for certiorari exist upon the situation as it now stands. It is not known at this time whether the Government will prosecute an appeal in the *Lykes* case. Unless this Court grants certiorari in the case at bar, the Government may settle or dismiss the appeal in the *Lykes* case in order to avoid a conflicting decision by the Court of Appeals for the Fifth Circuit.

Petitioner in his Petition filed herein August 15, 1949 urged that the decision of the Court of Appeals in the case at bar was in conflict in principle with the authoritative interpretation of Sec. 23(a)(2) by this Court in the *Bingham* case. After the decision of the *Bingham* case in 1945, the Treasury Regulations were amended in conformity therewith with respect to the deductibility of attorney fees incurred by a trustee under a testamentary trust. However,

such amended regulations specifically denied such deductibility in the case of a donor in connection with an *inter vivos* gift.

If such Treasury Regulations are invalid as being in conflict with the statute, is there any valid reason for permitting the Government to enforce the same *indefinitely* against all taxpayers until at some future date a conflict of decisions may arise in different Courts of Appeal?

For the foregoing reasons, it is respectfully urged that this Petition for a Rehearing be granted.

Respectfully submitted,

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Of Counsel.

October 24, 1949.

CERTIFICATE OF COUNSEL.

I, Robert Ash, counsel for the above named Petitioner, do hereby certify that the foregoing Petition for Rehearing in this cause is presented in good faith and not for delay, and that the foregoing grounds are confined to intervening circumstances of substantial or controlling effect.

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